Supreme Court No. 89347-1
Court of Appeals No. 31383-2-III

THE SUPREME COURT OF THE
STATE OF WASHINGTON

ASPEN SHACKLETON III LLC,
Respondent,

vs.

CHRISTOPHER BURKHARDT,
Appellant.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Valerie I. Holder, WSBA #42968
RCO Legal, P.S.
13555 SE 36th St., Ste 300
Bellevue, WA 98006
Telephone: (425) 457-7874
Fax: (425) 458-2131
vholder@rcolegal.com

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I. IDENTITY OF RESPONDENT

Respondent in this action, and the prevailing party in both the Court of Appeals and trial court, is Aspen Shackleton III, LLC ("Aspen Shackleton").

II. COURT OF APPEALS DECISION

Petitioner Christopher Burkhardt ("Burkhardt") is seeking review the Motion on the Merits and denial of his Motion to Modify that ruling

III. RESPONSE TO ISSUES PRESENTED IN PETITION

The scope of Burkhardt's Issues Presented for Review encompasses elements RCW 59.12 *et seq.* and whether an order of default is void or voidable. Neither of these issues, however, satisfies the considerations governing review set forth in R.A.P. 13.4(b).

IV. STATEMENT OF THE CASE

This was an action for unlawful detainer following a non-judicial deed of trust foreclosure.

Burkhardt executed a deed of trust dated July 2, 2007, and recorded on July 9, 2007, under Spokane County Auditor's File Number 5560305 ("Deed of Trust"). CP 9, Exhibit A to Complaint (Trustee's Deed). The Deed of Trust secured the real property located at 1012 West Hazard Road, Spokane, WA 99208 ("Property"). *Id.* The Deed of Trust was executed to secure the payment of the promissory note in the sum of $409,500.00. *Id.*

Default under the terms of the Deed of Trust occurred; thus, a non-judicial foreclosure action was commenced. *Id.* On January 20, 2012, a non-judicial foreclosure sale was held in compliance with RCW 61.24 *et seq.* *Id.* Aspen Shackleton was the

highest bidder at the foreclosure sale and the trustee's deed was issued to Aspen Shackleton on January 30, 2012. CP 8-10, Exhibit A to Complaint (Trustee's Deed).

More than twenty days passed since the foreclosure sale and Burkhardt remained in possession of the property; thus, on April 22, 2012, Burkhardt was served with a Summons and Complaint for Unlawful Detainer. CP 11, Declaration of Service. Counsel for Aspen Shackleton did not receive a response from Burkhardt or any other occupant of the premises and accordingly Aspen Shackleton filed a Motion for Default. CP 77-78, Declaration of Cordellia Norcross-Ventura; *see also* CP 12-26, Motion for Order of Default and Default Order. Aspen Shackleton's Motion for Default was granted and an Order Issuing Writ of Restitution was entered on May 16, 2012. CP 21-22, Order of Default.

On May 23, 2012, Burkhardt filed for Bankruptcy. CP 63; 65, Exhibit A to Declaration of Valerie I. Holder (Bankruptcy Docket). Subsequently, on June 25, 2012, an Order Granting Aspen Shackleton *in rem* relief from the automatic bankruptcy stay was granted. CP 63; 71, Exhibit B to Declaration of Valerie I. Holder (Order Granting Relief from Stay). As Aspen Shackleton had obtained relief from the automatic stay, a lock-out of the Property occurred on June 26, 2012. CP 63.

Following the lock-out of the property, Aspen Shackleton provided Burkhardt a letter notifying him that he has 30 days to schedule a time with a designated real estate broker to remove any remaining personal property items. *Id.*, Exhibit C to Declaration of Valerie I. Holder (Abandoned Property Notice)..

Roughly five months after an Order Issuing Writ of Restitution had been entered with the Superior Court, Burkhardt filed a Motion for Order Vacating Default and

Quashing Writ of Restitution. CP 35-51, (Motion and Memorandum to Vacate Default). Burkhardt's Memorandum in support of his Motion to Vacate alleged that the Order of Default and Order Issuing Writ of Restitution should be vacated and quashed because Burkhardt had appeared and was entitled to notice prior to an entry of default. CP 43-47(Memorandum to Vacate Default). In support of this argument, Burkhardt cited CR 55 and CR 60. *Id.* Counsel for Aspen Shackleton was not served with Burkhardt's Motion, but received a copy of the Motion directly from Aspen Shackleton. CP 7 (Declaration of Valerie I. Holder).

Burkhardt's Motion to Vacate Default was argued on November 2, 2012, before The Honorable Judge Greg Sypolt, of the Spokane County Superior Court. After hearing argument from both sides, Judge Sypolt took the matter under advisement and issued a letter to the parties on December 7, 2012, which detailed the facts of the case and arguments made. CP 98-102 (Letter from Judge Sypolt). In the letter, Judge Sypolt explained the court's discussion and findings. *Id.*

First, the Court's letter stated that Burkhardt did not properly appear in the unlawful detainer action, and that Aspen Shackleton did not engage in any effort to conceal the litigation. *Id.*

Second, the Court's letter stated that Burkhardt, in his Motion to Vacate, failed to fulfill the four-prong test established in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581, (1968). *Id.*

Third, the Court's letter stated that Aspen Shackleton's motion for default and subsequent order for default issuing writ of restitution were proper. *Id.* Lastly, the letter stated that the Order of Default and Writ of Restitution should not be vacated as

Burkhardt failed to satisfy the four-prong test in *White*. *Id.* The Court's letter instructed the parties to prepare an order and appear for a presentment hearing on December 14, 2012. *Id.*

On December 14, 2012, an Order denying Burkhardt's Motion to Vacate Default and Quash Writ of Restitution was entered, in accordance with Judge Sypolt's letter. CP 105-108 (Order Denying Defendant's Motion to Vacate Default).

Burkhardt filed a Notice of Appeal of the December 14, 2012, Order from the Spokane Superior Court. Aspen Shackleton filed a Motion on the Merits on May 13, 2013. The Honorable Commissioner Joyce J. McCown heard oral argument from both sides on Aspen Shackleton's Motion on the Merits and found that the trial court did not abuse its discretion when it denied Burkhardt's Motion to Vacate Default.

Subsequently, Burkhardt filed a Motion to Modify Ruling on June 27, 2013. Aspen Shackleton timely responded. On August 26, 2013, the Court of Appeals entered an Order Denying Burkhardt's Motion to Modify Ruling.

Burkhardt now petitions this Court for review.

V. RESPONSE ARGUMENT

A. Standard for Acceptance of Review.

Under R.A.P. 13.4(b), "[a] petition for review will be accepted by the Supreme Court only":

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As will be explained below, the arguments in Burkhardt's Petition for Review do not satisfy any of these considerations.

B. The Court of Appeals did not err in applying the four factor test set out in *White v. Holm.*

When determining whether to vacate a default judgment, a court must consider two primary and two secondary factors. Washington courts have held that in a motion to vacate a default judgment, the moving party must meet the four-part test set forth in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). The two primary factors of that test are (1) "[t]hat there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect." *Id.* at 352. The two secondary factors a court must consider are (1) "that the moving party acted with due diligence after notice of entry of the default judgment;" and (2) "that no substantial hardship will result to the opposing party." *Id.* "These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors." *Id.* at 352-53.

While default judgments are not favored under the law, it is within the trial court's discretion whether a default judgment should be vacated under CR 60(b). *Housing Auth. v. Newbigging*, 105 Wn. App. 178, 185, 19 P.3d 1081 (2001). "The reviewing court will not overturn the trial court unless it plainly appears that its discretion has been abused.'" *Id.* A trial court abuses its discretion when it makes a decision or order on untenable grounds or for manifestly unreasonable reasons. *Id.* "[T]he

discretionary judgment of a trial court of whether to vacate [an order] is a decision upon which reasonable minds can sometimes differ." *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990). Thus, if the decision "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Id.*

In order for the default to be vacated, Burkhardt was required to show: (1) the existence of substantial evidence to support at least a prima facie defense to the claim that Aspen Shackleton was not entitled to possession of the property; and (2) his failure to timely appear prior to default judgment was the result of mistake, inadvertence, surprise or excusable neglect. In addition, Burkhardt was required show that (3) he exercised diligence in seeking relief after notice of the default judgment; and (4) that the effect on Aspen Shackleton would not be prejudicial if the judgment was vacated."

Here, Burkhardt has not presented a strong or conclusive defense. Burkhardt's motion to vacate default rests upon the premise that Burkhardt faxed a response to counsel for Aspen Shackleton; thus, default should never have been entered. *See* CP 43-47 (Memorandum in Support of Motion for Order Vacating Default). This fact was disputed by Aspen Shackleton, and Burkhardt has provided no other basis for why the default should be vacated. *See* CP 77-78 (Declaration of Cordellia R. Norcross-Ventura).

First, the response allegedly faxed to counsel for Aspen Shackleton by Burkhardt did not contain a defense to the unlawful detainer action. *See* CP 35-40 (Declaration of Christopher Burkhardt). The response that was allegedly faxed demanded that the unlawful detainer action be filed, and indicated that the parties were negotiating an agreement, and he demanded "A NEW CASH FOR KEYS AGREEMENT TO ALLOW MYSELF TIME TO VACATE AFTER FINDING A NEW RESIDENCE." CP 38.

Furthermore, Burkhardt's motion to vacate default did not present the minimum prima facie defense, which is necessary to satisfy the first prong of the analysis. Burkhardt failed to set forth any reason, let alone any substantial reason why Aspen Shackleton should not be entitled to the relief granted to it. Thus, Burkhardt failed to meet the first prong of the test as he failed to present a prima facie defense that Aspen Shackleton was not entitled to possession of the property.

Second, Burkhardt alleges that he did timely appear in the action; however, counsel for Aspen Shackleton has no record of receiving a fax from Burkhardt at any time prior to entry of default judgment. *See* CP 35-40 (Declaration of Christopher Burkhardt); *see also* CP 77-78 (Declaration of Cordellia R. Norcross-Ventura). While Burkhardt may have sent a fax to counsel for Aspen Shackleton, Burkhardt did not verify that the fax was in fact received by counsel for Aspen Shackleton. Burkhardt has not provided substantial evidence to support a finding that the second prong of the test has been met.

Third, Burkhardt failed to exercise due diligence in seeking relief after the default judgment had been entered. Burkhardt waited well over five months before filing his motion to vacate default. The order for default was entered on May 16, 2012; however, Burkhardt did not file his motion to vacate default until October 17, 2012. *See* CP 21-22 (Order of Default); and CP 41-42 (Motion for Order Vacating Default). Furthermore, Burkhardt was clearly aware that default had been entered because he was physically removed from the property and locked out on June 26, 2012. *See* CP 63. The unlawful detainer action is a summary proceeding, and because of its quick nature, waiting five months to vacate a default cannot be a showing of due diligence. *See In re Estate of*

Stevens, 94 Wn. App. 20, 35, 971 P.2d 58 (1999) (three-month inaction demonstrated lack of due diligence). Thus, Burkhardt failed to fulfill the third prong of the test as he failed to act with due diligence to vacate the order of default.

Lastly, because a lockout of the property occurred on June 26, 2012, and had been vacant for nearly four months, vacating the default judgment would cause significant hardship and prejudice to Aspen Shackleton. If the default judgment had been vacated, Burkhardt arguably would have been allowed to re-occupy the Property after he had been physically removed from it several months earlier. *See* CP 63 (Declaration of Valerie I. Holder). Burkhardt failed to provide a defense as to why Aspen Shackleton is not entitled to possession of the property and to allow Burkhardt to re-occupy the property after it had been vacated and cleaned out, would have been prejudicial to Aspen Shackleton and would interfere with Aspen Shackleton's statutory right to a summary proceeding to obtain possession of the Property. Therefore, Burkhardt failed to meet the fourth prong of the test by failing to show that vacating the default would not be prejudicial to Aspen Shackleton.

In sum, Burkhardt failed to present a defense to the unlawful detainer action, failed to act with due diligence, and vacating the default would be prejudicial and cause an undue hardship on Aspen Shackleton. Consequently, the trial court did not abuse its discretion when it denied Burkhardt's motion to vacate default, and the Court of Appeals, Division Three, did not err when it affirmed that decision.

There is no conflicting decision, significant question of law, or issue of substantial public interest presented in Burkhardt's Petition for Review; he merely complaints of the

expected and permissible outcome brought by virtue of his default. This Court should not accept review under these circumstances.

C. Pursuant to RAP 14.2, Aspen Shackleton requests a cost award pursuant to RAP 14.1

Pursuant to R.A.P. 14.2, "[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review." In the event this Court files a decision terminating review. Aspen Shackleton will file a cost bill in accordance with R.A.P. 14.4.

VI. CONCLUSION

Based on established case law, and the record herein, the Court of Appeals, Division Three, correctly affirmed trial court's decision denying Burkhardt's motion to vacate an order of default. None of the elements found in R.A.P. 13.4(b) are present here, and this Court should deny Burkhardt's Petition for Review.

DATED this 22nd day of October, 2013.

RCO LEGAL, P.S.

By: _____
Valerie I. Holder, WSBA #42968

Of Attorneys for Respondent
Aspen Shackleton III, LLC

OFFICE RECEPTIONIST, CLERK

To: Emily Landi
Cc: Valerie Holder
Subject: RE: 301027-013 / Aspen Shackleton III LLC v. Christopher Burkhardt / Our Case No: 22194

Rec'd 10-22-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Emily Landi [mailto:elandi@rcolegal.com]
Sent: Tuesday, October 22, 2013 2:33 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Valerie Holder
Subject: 301027-013 / Aspen Shackleton III LLC v. Christopher Burkhardt / Our Case No: 22194

Good afternoon,

Please see attached documents for filing in reference to the following case.

Case name: Aspen Shackleton III LLC v. Christopher Burkhardt

Case number: 8934-1

Attorney contact: Valerie Holder, 425-457-7874, WSBA#42968, vholder@rcolegal.com

Thank you,

Emily Landi
Paralegal

Direct: 425-457-7826
elandi@rcolegal.com

RCO
RCO LEGAL, P.S.

RCO Legal, P.S., 13555 SE 36th St., Suite 300, Bellevue, WA 98006
Main: 425.458.2121 **Main Fax:** 425.458.2131 **Web:** www.rcolegal.com

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